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SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY PRESENT:
Hon. DORIS LING-COHAN, Justice PART 36

NYU Hospitals Center

-v-

Mei Rong Hwang et al.

ORDER

INDEX NO. 102832/2011
MOTION DATE
MOTION SEQ. NO. 005
MOTION CAL.NO.

The following papers(1 to ___) were read on this motion to/for_____

Papers	Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1, 2
Answering Affidavits - Exhibits	3
Replying Affidavits	

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion to renew/reargue by plaintiff is decided in accordance with the attached memorandum decision. (denied).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
OCT 01 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/27/12

DORIS LING-COHAN, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

NYU HOSPITALS CENTER, Plaintiff, -against- MEI RONG HUANG, AETNA LIFE INSURANCE COMPANY, and PHILIPS-VAN HEUSEN CORPORATION, Defendants.	:	Decision and Order Index No. 102832-2011 Motion Seq. No. 003

DORIS LING-COHAN, J.:

On January 18, 2012, this court issued a Decision and Order granting in part, and denying in part, a motion by defendants Aetna Life Insurance Company (Aetna) and PVH Corporation[1] (PVH) to dismiss plaintiff NYU Hospitals Center's (NYU) complaint against them, pursuant to CPLR 3211 (a) (3) (claimant lacks the capacity to sue) and 3211 (a) (7) (failure to state a cause of action). Such decision dismissed the fifth cause of action in the complaint against PVH, which alleged that PVH "negligently omitted to inform Aetna that the patient's coverage was to terminate as of January 1, 2009" and "misrepresented to plaintiff through Aetna that the patient was insured" (affirmation of Hecht, exhibit A, Complaint, at 5, ¶ 43 & 47). The fifth cause of action is the only cause of action asserted against PVH. NYU

[1] Effective June 23, 2011, the Phillips-Van Heusen Corporation changed its name to the PVH Corporation.

now moves, pursuant to CPLR 2221 (d), (e) and (f) for leave to reargue and renew PVH's prior motion to dismiss the complaint for failure to state a cause of action.

NYU challenges the court's decision on two grounds that NYU argues that the court overlooked or misapprehended. First, NYU claims that PVH failed to refute that the complaint set forth a claim for equitable estoppel, and that the court also failed to address the equitable estoppel allegations in the complaint. Specifically, NYU argues that the court mischaracterized the allegations in the fifth cause of action against PVH as a negligent misrepresentation cause of action, and so, did not address the allegations as a claim for equitable estoppel. NYU insists that the causes of action are maintainable under both theories.

Second, NYU contends that certain facts "were not raised because it was believed that the complaint would withstand PVH's ... challenge to dismiss the complaint ... under the liberal standard of review applicable to such motion" (affirmation of Hecht, at 4, ¶ 14). NYU argues that it is now proffering new facts not offered on the previous motion that would have changed the outcome. These "new facts" are allegedly found in an affidavit previously provided to the court by Aetna. In response, PVH claims that these arguments are meritless.

NYU also argues that, in the event that the motion is

granted and the court reinstates the claim for equitable estoppel against PVH, NYU will serve a supplemental summons adding PVH's medical plan, PVH Corp. & Subsidiaries Health and Welfare Benefits Plan (PVH Plan) as a defendant, and serve an amended complaint asserting a claim for equitable estoppel against the PVH Plan. Copies of the proposed amended complaint and supplemental summons were annexed to NYU's motion papers. Deleted from the proposed amended complaint are allegations that the patient was covered under a group health insurance policy.

BACKGROUND

The facts and circumstances of the case are set forth in detail in the prior written decision of the court discussed *infra*, and only the portions pertinent for present purposes will be set forth here. NYU seeks payment for inpatient rehabilitation services rendered to a patient from February 18, 2009 through March 30, 2009, which plaintiff alleges that defendants promised to pay. NYU sued Mei Rong Huang, the patient's alleged spouse and former PVH employee, Aetna, and PVH, which had a group health insurance policy for its employees with Aetna. NYU is a participating provider in Aetna's health care network under a contract with U.S. Healthcare, which subsequently became part of Aetna Health Inc.

ANALYSIS

A. Motion to Reargue

CPLR 2221 (d) (2) provides that "[a] motion for leave to reargue: ... (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Reargument is not "designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted [internal citations omitted]" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). Moreover, reargument is not available where the moving party seeks only to argue a new theory of liability not previously advanced, and failed to show how the court misconstrued facts or law (*see DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715 [1st Dept 2005]). Additionally, leave to reargue is based upon the discretion of the court (*see McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

In its original decision, the court determined that the fifth cause of action, identified by the court as a claim for negligent misrepresentation, was insufficient to state a cause of action. On this motion to reargue, NYU now asserts that the fifth cause of action was actually an equitable estoppel cause of

action.

To the extent that there is confusion as to the nature of the fifth cause of action, and in light of the fact that the court did not address a claim for equitable estoppel, the court will, in the interest of justice, address dismissal of such a claim and therefore, grants reargument to this limited extent.

Upon reargument, however, NYU has not successfully asserted a claim for equitable estoppel against PVH. The doctrine of equitable estoppel may be invoked in the interest of fairness to prevent a fraud or injustice upon the person against whom enforcement of a right is sought, and who justifiably relied upon the opposing party's words or conduct (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). In order for PVH to be equitably estopped from denying that coverage existed under the employee plan, NYU must show: (1) conduct by PVH which amounts to a false representation which is calculated to convey the impression that the facts are otherwise than what PVH asserts in this case; (2) PVH's intention or expectation that its conduct would be acted upon by NYU; and (3) PVH's knowledge of the true facts (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985]). Further, NYU must show, with respect to itself, a lack of knowledge of the true facts, reliance upon the conduct of PVH, and a prejudicial change in position (*id.*; *see also River Seafoods, Inc. v JPMorgan Chase*

Bank, 19 AD3d 120, 122 [1st Dept 2005]).

In the present case, NYU did not allege, in its complaint, that PVH had actual or constructive knowledge of the true facts or that it concealed a material fact. In fact, the complaint specifically alleges that "PVH negligently omitted to inform Aetna that the patient's coverage was to terminate" (Complaint, at 5, ¶ 43). Based upon this language, the court expressly considered a negligent misrepresentation cause of action, and rejected it for failure to state a cause of action. Since NYU alleged that PVH acted negligently, it cannot satisfy the "knowing the true facts" or "concealing a material fact" prongs of the equitable estoppel claim. There is no claim that PVH intentionally set out to mislead NYU. However, NYU contends that this missing element is unimportant, as courts do not always require a showing that the party estopped knew its representation was false.

NYU's argument rests primarily on *Matter of Shondel J. v Mark D.* (7 NY3d 320 [2006]), a matter related to a child support proceeding, where the New York Court of Appeals held that a man who has mistakenly represented himself as a child's father could be estopped from denying paternity, based on the best interests of the child. The *Shondel J.* Court stated that the doctrine of equitable estoppel "preclude[s] a person from asserting a right after having led another to form the reasonable belief that the

right would not be asserted" (*id.* at 326). The New York Court of Appeals further stated "a party who ... does not realize that his representation was factually inaccurate may yet be estopped from denying the representation when someone else--here the child--justifiably relied on it to her detriment" (*id.* at 331, citing to *Romano v Metropolitan Life Ins. Co.*, 271 NY 288, 293-294 [1936]; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]).

Under the terms of the PVH Summary Plan Description (SPD), Aetna was responsible, as the claims administrator, for precertification, and PVH has the discretion to interpret plan provisions and the SPD. The complaint alleges that an unidentified NYU representative contacted an unidentified Aetna representative, who precertified the patient's admission, and stated that the patient was entitled to health care benefits for the services to be provided. Thus, NYU rendered services to the patient, pursuant to authorizations issued by Aetna. Subsequently, NYU billed Aetna, and Aetna paid plaintiff $76,923.25. Aetna eventually recouped its payment, alleging that the patient was not entitled to health care benefits from Aetna on the dates of service. The complaint further alleges that PVH retroactively cancelled the patient's coverage under its group health insurance policy after services had been rendered, and after Aetna had paid NYU. After examining the complaint, the

equitable estoppel cause of action asserted by NYU against PVH is insufficient. NYU's claim of reasonable reliance on PVH's representations is lacking; accepting NYU's position that Aetna represented that the patient had insurance coverage, and that NYU relied on that representation, the fact remains that the complaint fails to allege that NYU detrimentally relied either on a specific oral or written representation made by PVH of its intent to be bound or on its conduct, as the equitable estoppel claim requires. Therefore, NYU cannot avail itself of the equitable estoppel cause of action against PVH.

B. Motion to Renew

Alternatively, NYU urges renewal on the ground that it is, allegedly offering new facts, in the form of an affidavit submitted by Mary Kazan, PVH's Group Vice-President, Benefits and Compensation, to which the SPD was annexed as an exhibit. Those facts include that: PVH's health care plan "is self-insured [i.e. claims for health care benefits are paid with PVH's funds] for the majority of the claims paid from the plan" (affirmation of Hecht, exhibit C, PVH Company Medical Plan, Introduction, at 7, ¶ 4); PVH's network providers are Aetna's participating providers (*id.* at Bates No. 000006); PVH network providers are required to obtain precertification for hospital admissions from Aetna (*id.* at Bates No. 000014, 000024, 000054); and PVH network providers are required to obtain authorization from Aetna for a patient's

continued stay beyond the number of days initially authorized by Aetna (*id.* at Bates No. 0000094). Accordingly, NYU maintains that these alleged new facts set forth claims for both negligent misrepresentation and equitable estoppel against PVH.

CPLR 2221 (e) sets forth the three-pronged standard for a motion for leave to renew as follows:

> "A motion for leave to renew:
> 1. shall be identified specifically as such;
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion."

Turning to the merits, NYU's motion to renew is not based on "new" facts. Indeed, NYU admits that it failed to assert these facts previously, because it did not believe that these facts would be necessary. Notwithstanding the admission, NYU now claims that "new facts" were provided in the Kazan affidavit, which was submitted on May 13, 2011, prior to the court's original decision on the motion to dismiss. The alleged new facts merely highlight the fact that Aetna administers all claims for benefits under the PVH Plan. NYU's belatedly offered information does not present the type of new evidence justifying a grant of renewal, or modification of this court's prior decision.

Even assuming that the particular facts offered by NYU may be characterized as new facts, NYU has failed to offer a valid

reason for not placing those facts before the court at the time the prior motion was made.

Relying on *Bustos v Lenox Hill Hosp.* (80 AD3d 539, 539 [1st Dept 2011]), *Rancho Santa Fe Assn. v Dolan-King* (36 AD3d 460, 461 [1st Dept 2007]), and *Mejia v Nanni* (307 AD2d 870, 871 [1st Dept 2003]), NYU argues that even if the requirements for renewal are not met in this case, renewal may still be granted as a matter of "substantive fairness" (*Rancho Santa Fe Assn. v Dolan-King,* 36 AD3d at 462).

However, "[r]enewal is granted sparingly ...; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation [internal quotation marks and citation omitted]."(*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]). While a court may, in its discretion, and in the interest of justice and fairness, grant a motion to renew on the basis of facts known to the moving party at the time of the prior motion, a court may also decline to exercise its discretion to do so where, as is the case here, the moving party failed to exercise due diligence in obtaining the evidence now offered to the court in support of its motion to renew, and where the moving party also failed to provide a reasonable explanation for not submitting those same facts in the original motion (*see* CPLR 2221 [e] [3]; *225 Fifth Ave. Retail LLC v 225 5th, LLC*, 92 AD3d 471, 472 [1st Dept 2012] [motion to renew properly denied as

"new fact" offered could have been obtained before original motion was filed]; *Whalen v New York City Dept. of Envtl. Protection*, 89 AD3d 416, 417 [1st Dept 2011] ["City failed to show that it exercised due diligence in investigating the facts relevant to its liability or that it had a reasonable excuse for failing to present these facts, which it discovered in publicly available documents concerning its own property, on the prior motion"]; *Eddine v Federated Dept. Stores, Inc.*, 72 AD3d 487, 487-488 [1st Dept 2010] [third party failed to exercise due diligence in obtaining expert reports, and also failed to provide a reasonable explanation for not presenting such facts on its prior motion]).

Moreover, the same arguments and facts provided on the motion to renew were considered in examining NYU's motion to reargue. Therefore, denial of the motion to renew does not result in substantive unfairness to NYU. Therefore, the instant motion, to the extent that it seeks renewal of the previous motion to dismiss, is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that, the portion of the motion of plaintiff NYU Hospitals Center for leave to reargue the motion to dismiss the fifth cause of action against defendant PVH Corporation is granted; and it is further

ORDERED that, upon reargument, the court adheres to its Decision and Order, dated January 18, 2012, granting and denying the motion to dismiss in part, and dismissing the fifth cause of action against defendant PVH Corporation; and it is further

ORDERED that the portion of the motion of plaintiff for leave to renew the motion to dismiss the fifth cause of action is denied.

Dated: 9/27/12, 2012

Doris Ling-Cohan, J.S.C.

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